

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

20 APR -9 PM 3:48

CLERK-ALBUQUERQUE /mn

DAVID WARNER
PLAINTIFF/PETITIONER,

Vs.

Case No. 20 cv 321 GJF

CITY OF ROSWELL, AND MAYOR
DENNIS J. KINTIGH IN HIS PERSONAL
AND OFFICIAL CAPACITY,
ROSWELL POLICE DEPARTMENT,
CHIEF OF POLICE PHILIP SMITH, IN
HIS PERSONAL AND OFFICIAL CAPACITY,
ROSWELL POLICE OFFICER JOEL SMOYER
IN HIS PERSONAL AND OFFICIAL CAPACITY,
ROSWELL ATTORNEY PAUL SANCHEZ,
MUNICIPAL COURT JUDGE LOU MALLION IN
HIS PERSONAL AND OFFICIAL CAPACITY,
MUNICIPAL COURT JUDGE ERIC BRACKEEN
IN HIS PERSONAL AND OFFICIAL CAPACITY.
MUNICIPAL COURT CLERK JANE DOE,
DEFENDANT'S/RESPONDANTS.

COMPLAINT

COMES NOW, David Warner- plaintiff/petitioner with his Complaint pursuant to
Title 42 U.S.C. § 1983 for United States Constitutional Violations, Damages
and Declaratory Relief against Defendants while acting under color of law, City of
Roswell a Municipality, Chief of Police Philip Smith, Roswell Police Officer Joel
Smoyer, Dennis J. Kintigh, Mayor of the City of Roswell, Municipal Court Judge
Eric Brackeen, Municipal Court Judge Lou Mallion, Municipal Court Judge Clerk

Jane Doe for their deliberate indifference, class-based animus (that being pro se), unconstitutional implementing and execution of their policy, custom, ordinance, regulation, and decisions officially adopted by that body's officers for redress of violations under color of law and rights guaranteed to plaintiff by the Constitution of the United States and the Constitution of the State of New Mexico.

JURISDICTION AND VENUE

1. Plaintiff is a citizen of the United States and a resident of the state of New Mexico.
2. This is a Civil rights Action for money damages pursuant to Title 42 U.S.C. § 1983 to redress violations under color of law and rights guaranteed to plaintiff by the Constitution of the United States and the Constitution of the State of New Mexico.
3. Defendant City of Roswell a Municipality, is a government entity that is a duly political subdivision of the State of New Mexico and as such is properly subject to suit in this Court.
4. Defendant Roswell Chief of Police Philip Smith, Roswell Police Department, 128 W. Second Street, Roswell, NM 88201, Phone: (575) 624-6770, in his personal, official, and supervisory capacity is an employee for the city of Roswell and to the best of plaintiff's knowledge resides in Roswell N.M.

5. Defendant Roswell Police Officer Joel Smoyer, Roswell Police Department, 128 W. Second Street, Roswell, NM 88201, Phone: (575) 624-6770, in his personal and official capacity is and employee for the city of Roswell and to the best of plaintiff's knowledge resides in Roswell N.M.

6. Defendant Dennis J. Kintigh, Mayor of the City of Roswell in his personal and official capacity and to the best of plaintiff's knowledge resides in Roswell N.M.

7. Defendant Municipal Court Judge Eric Brackeen in his personal and official capacity to the best of plaintiff's knowledge resides in Roswell, N.M.

8. Defendant Municipal Court Judge Lou Mallion in his personal and official capacity to the best of plaintiff's knowledge resides in Roswell, N.M.

9. Defendant Municipal Court Judge Clerk Jane Doe in her personal and official capacity to the best of plaintiff's knowledge resides in Roswell, N.M.

10. Defendants City of Roswell Mayor Dennis J. Kintigh, Roswell Chief of Police Smith, Roswell Police Officer Joel Smoyer, Municipal Court Judge Clerk Jane Doe, Municipal Court Judge Eric Brackeen and Municipal Court Judge Lou Mallion (herein to be known as Defendants) while acting under color of law did violate plaintiff's First Amendment Right to Free Speech, Fifth Amendment Right to Due Process, Sixth Amendment Right to confront witness(es), Fourteenth Amendment Right to Due Process and equal protection, access to the court(s), right to confront

witness(es), deliberate indifference, class-based animus (that being pro se defendants), unconstitutional implementing and execution of their policy, custom, ordinance, regulation, failure to train/supervise and decisions officially adopted by Police Officers, Officers of the Court and municipal employees which were extreme and outrageous under the circumstances causing plaintiff extreme emotional distress lasting for several years.

11. This cause arises under Title 42 U.S.C. Section 1983 and 1985, therefore, this Court has jurisdiction over the instant matter pursuant to 28 U.S.C. Sections 1343 And 1331.

FACTS

12. Plaintiff re alleges and restates above paragraphs 1-11.

13. On March 12, 2017, plaintiff was cited into Municipal Court by way of three traffic citations.

14. On March 21, 2017, plaintiff filed "*Demand for Discovery*" pursuant to "*Brady v. Maryland*, 373 U.S. 83 (1963), *Giles v. Maryland*, 386 U.S. 66 (1967) and *United State v Agurs*, 427 U.S. 97 (1976) and NMRA 1978 § 8-504", in the Roswell Municipal Court.

15. On April 17, 2017, plaintiff was to do an interview with Roswell Police Officer

Joel Smoyer at the Roswell Public Library and accompanied by City Attorney Paul Sanchez. This interview did not take place due to Officer Smoyer refusing to give a statement to plaintiff while being recorded in violation of plaintiff's Rights.

Furthermore, at this time Counsel for the City of Roswell provided plaintiff with a manila envelope containing several documents as discovery one day prior to trial in violation of *NMRA 1978 8-504. A. Disclosure by state. Not less than ten (10) days before trial,...*

16. On April 18, 2017, plaintiff filed "*Motion in Limine*" and "*Verified Notice of Due Process and Rule Violations with Supporting Affidavit's*" in the Roswell Municipal Court.

17. On April 18, 2017, trial was held in Municipal Court and plaintiff was found guilty of three municipal traffic ordinance violations.

18. During the proceedings in Municipal Court, plaintiff was not allowed to file an "*Application for Free Process and Affidavit of Indigency*" "*Motion to Compel*" or subpoenas by the Head Court Clerk and Municipal Court Judge Eric Brackeen.

19. On April 26, 2017, plaintiff timely filed a "*Verified Motion for De Novo Review of Municipal Court's Deprivation of Defendant's Rights*" / Appeal, with the Fifth Judicial District Court, but the Court Clerk then retrieved the Appeal and whited out the file stamp and did not allowed plaintiff to file the Appeal until plaintiff's

"Application for Free Process and Affidavit of Indigency" was granted or as the Clerk stated to plaintiff, plaintiff could pay for the appeal.

20. On June 20, 2017, plaintiff was finally allowed to file his *"Verified Motion for De Novo Review of Municipal Court's Deprivation of Defendant's Rights"*/ Appeal.

21. On December 19, 2017, plaintiff was tried and found guilty in the Fifth Judicial Court for violation of three municipal traffic ordinances.

22. On February 27, 2018, *"Judgment and Sentence"* was imposed by the Fifth Judicial District Judge Freddie J. Romero.

23. On March 23, 2018, plaintiff timely filed *"Notice of Appeal"* in the Court of Appeals for the State of New Mexico.

24. On October 17, 2018, *"Notice of Proposed Summary Disposition"* was filed by the New Mexico Court of Appeals.

25. On November 11, 2018 *"Memorandum Opinion"* was filed by the New Mexico Court of Appeals in favor of plaintiff for discovery violations and plaintiff's *"Motion In Limine"* filed in Municipal Court.

26. New Mexico Court of Appeal Chief Judge Linda M. Vanzi reversed and remanded the case back to the Fifth Judicial District Court for appropriate consideration on the merits.

27. On February 19, 2019, *"Mandate to District Court Clerk"* was filed by Chief

clerk of the Court of Appeal Mark Reynolds.

28. On July 17, 2019 "Notice of Non-Jury Trial" was set for July 26, 2019 at 9:00 a.m. before the Honorable Thomas E. Lilley Fifth Judicial District Judge.

29. On August 7, 2019, "Order Granting Defendant's" "Verified Motion for De Novo Review of Municipal Court's Denial of Defendant's Rights" was granted to plaintiff stating in part that:

"denial of an interview materially prejudiced the Defendant's ability to prepare for trial and constituted a denial of due process; and As sanction... Officer Smoyer should be excluded from testifying at trial in Roswell Municipal Court..."

30. On February 20, 2020, "Notice of Dismissal" was filed in Municipal Court by City Attorney Parker W. Patterson.

31. These actions by Defendants while acting under color of law did cause plaintiff to be damaged (documents should be in the Fifth Judicial District Court Record Proper), where plaintiff was cited into Municipal Court, found guilty, appealed to District Court where lower court's ruling was affirmed then appealed to the Court of Appeals of New Mexico NO. A-1-CA-37249 where conviction was reversed.

32. As a result of the City of Roswell, Roswell Police Department and the Municipal Court's unconstitutional implementing and execution of their policies, customs, ordinances, regulations, failure to train/supervise and decisions they have

allowed or adopted have been implemented against other pro se defendant denying them their Due Process Rights as well as other Rights.

FIRST CAUSE OF ACTION

32. Plaintiff re alleges and restates above paragraphs 1-31.

33. Plaintiff was denied his right to confront witness(es) under the confrontational clause of the constitution when Officer Joel Smoyer refused to be interviewed and give statement. The Confrontation Clause of the Sixth Amendment guarantees all criminal defendants, state and federal, the right 'to be confronted with the witness(es) against' them."

34. The actions by Officer Smoyer were supported by City Attorneys Paul Sanchez, Jonathan e. Roehlk, Aaron S. Holloman and Municipal Judges Eric Brackeen and Lou Mallion by there agreement to continue prosecuting plaintiff.

SECOND CAUSE OF ACTION

35. Plaintiff re alleges and restates above paragraphs 1-34.

36. On April 17, 2017, one day prior to trial in Municipal Court, Defendant Officer Joel Smoyer was scheduled to be interviewed by plaintiff at the Roswell Public Library.

37. Plaintiff was first to arrive at the library and was setting up his recording equipment when Officer Smoyer arrived accompanied by Roswell City Attorney Paul Sanchez. Upon seeing plaintiff with the recording equipment Officer stated that he would not provide any statements nor conduct an interview while being recorded. Plaintiff stated that he would continue to record at which time Officer Smoyer and city attorney decided to leave.

38. Officer Smoyer's refusal to provide and interview or to have plaintiff take his statement denied plaintiff his Right to Due Process causing plaintiff damages.

THIRD CAUSE OF ACTION

39. Plaintiff re alleges and restates above paragraphs 1-38.

40. The failure to act of defendants City of Roswell and Mayor of Roswell, Dennis J. Kintigh and Roswell Chief of Police Philip Smith, and Officer Joel Smoyer deprived the plaintiff of his particular rights under the laws of the United States and the United States Constitution by denying plaintiff his right to Due Process.

41. The City of Roswell, Mayor Dennis J. Kintigh and Chief of Police Philip Smith and Officer Smoyer acted under color of state law.

42. The training policies of the defendant City of Roswell, Mayor Dennis J. Kintigh, Roswell Police Department and Chief of Police Philip Smith were not adequate to prevent violations of law by its employees train its police officers to

handle the usual and recurring situations with which they must deal with.

43. The defendant City of Roswell, Mayor Dennis J. Kintigh and Roswell Police Department, Chief of Police Philip Smith was deliberately indifferent to the substantial risk that its policies were inadequate to prevent violations of law by its employees known or obvious consequences of its failure to train its police officers employees adequately.

44. The failure of the defendant City of Roswell, Mayor Dennis J. Kintigh, Roswell Police Department and Chief of Police Philip Smith to prevent violations Of laws and rights by its employees to provide adequate training caused the deprivation of the plaintiff's rights by the Officer Joel Smoyer; that is, the defendant's failure to prevent violations of law by its employees to train is so closely related to the deprivation of the plaintiff's rights as to be the moving force that caused the ultimate injury.

FOURTH CAUSE OF ACTION

44. Plaintiff re alleges and restates above paragraphs 1-43.

45. Defendant Roswell Police Officer Joel Smoyer acted under color of law.

46. City and Mayor of Roswell and Roswell Chief of Police acted under color of state law;

47. The acts and failure to act by defendants City and Mayor of Roswell and Chief of Police deprived the plaintiff of his particular rights under the laws of the United

States Constitution by their unconstitutional implementing and execution of their policies, customs, ordinances, regulations, failure to train and supervise.

48. The Defendants City and Mayor of Roswell and Roswell Chief of Police acted pursuant to an expressly adopted official policy or a widespread or longstanding practice or custom of the defendant Officer Joel Smoyer.

49. The defendants City and Mayor of Roswell and Roswell Chief of Police official policy or widespread or longstanding practice or custom caused the deprivation of the plaintiff's rights by the Officer Joel Smoyer that is, the Defendants City and Mayor of Roswell and Roswell Chief of Police official policy or widespread or longstanding practice or custom is so closely related to the deprivation of the plaintiff's rights as to be the moving force that caused the ultimate injury.

FIFTH CAUSE OF ACTION

49. Plaintiff re alleges and restates above paragraphs 1-49.

50. Plaintiff was engaged in a constitutionally protected activity of recording in a public area of a public official that being Roswell Police Officer Joel Smoyer.

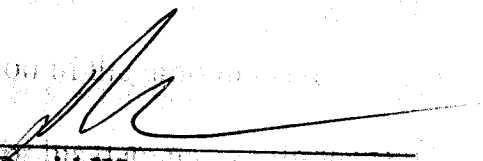
51. Defendant's actions against plaintiff would chill a person of ordinary firmness from continuing to engage in the protected activity.

52. Plaintiff's protected activity was a substantial or motivating factor in the defendant's conduct.

53. As a result of defendant's action plaintiff was damaged.

WHEREFORE, based on the foregoing, Plaintiff demands trial by jury on all issues triable by jury; request compensation in the amount(s) to be proven at trial by the jury to fully compensate Plaintiff for his damages including but not limited to damages of rights guaranteed by the United States Constitution, punitive damages; request an order from this Honorable Court for injunction against Defendant City of Roswell and other Defendants as necessary in order that the Rights of others similarly situated are not violated and Police Officers are properly trained, Attorneys fees, and plaintiff reserves the right to amend complaint as provided by the rules and authority and any other or further relief deemed necessary and just.

Submitted by;


David Warner-plaintiff
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